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NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LB

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

THE OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE,

Defendant.

11 4790
COMPLAINT FOR INJUNCTIVE
RELIEF FOR VIOLATION OF THE
FREEDOM OF INFORMATION ACT,
5 U.S.C. § 552

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff seeks the expedited processing and release of records in the possession of the Office of the Director of National Intelligence concerning the composition, membership, vacancies on, and appointments to the Intelligence Oversight Board. The requested records concern a matter about which there is “[a]n urgency to inform the public about an actual or alleged federal government activity,” and the request was “made by a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R.

1 § 1700.12(c)(2). Therefore, Plaintiff is statutorily entitled to the immediate processing and release
2 of the records it seeks.

3 PARTIES

4 2. Plaintiff Electronic Frontier Foundation ("EFF") is a not-for-profit corporation
5 established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco,
6 California and Washington, DC. EFF is a donor-supported membership organization that works to
7 inform policymakers and the general public about civil liberties issues related to technology and to
8 act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and
9 disseminate information concerning the activities of federal agencies.

10 3. Defendant Office of the Director of National Intelligence ("DNI") is a component of
11 the Executive branch of the United States government. DNI is an "agency" within the meaning of
12 5 U.S.C. § 552(f).

13 JURISDICTION

14 4. This Court has both subject matter jurisdiction over this action and personal
15 jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court
16 also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

17 VENUE AND INTRADISTRICT ASSIGNMENT

18 5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
19 § 1391(e).

20 6. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c)
21 and (d) because a substantial portion of the events giving rise to this action occurred in this district
22 and division, where Plaintiff is headquartered.

23 FACTUAL ALLEGATIONS

24 The Intelligence Oversight Board

25 7. The Intelligence Oversight Board ("IOB") coordinates the Executive branch's
26 intelligence oversight activities. The IOB, a component of the larger President's Intelligence
27 Advisory Board ("PIAB," formerly the President's Foreign Intelligence Advisory Board, or
28 "PFIAB"), was created by President Ford by Executive Order ("EO") 11905 on February 18, 1976.

8. The IOB was created to serve as an independent civilian-liaison between the intelligence community and the Executive. *See* Charlie Savage, *President Weakens Espionage Oversight*, BOS. GLOBE, March 14, 2008.¹ The IOB's mission is to "oversee the Intelligence Community's compliance with the Constitution and all applicable laws, Executive Orders, and Presidential Directives." President's Intelligence Advisory Board and Intelligence Oversight Board, *About the PIAB*.² The IOB fulfills its mission by reviewing misconduct reports filed by intelligence agencies and then alerting the President and the Attorney General of any intelligence activities the IOB deems to be "unlawful or contrary to an Executive Order or presidential directive." *See* Exec. Order Amending Exec. Order 13462 (Oct. 28, 2009).³ For nearly 30 years, only limited modifications to the IOB's structure and authority occurred. Savage, *President Weakens Espionage Oversight*.

9. Under the Bush Administration, the oversight capacity of the IOB was either ineffective or impaired in various ways. First, President Bush failed to appoint members to the IOB from 2001 until 2003. *Id.* Second, despite receiving notice of hundreds of violations from 2003 to 2005, the IOB failed to forward a single violation to the Attorney General for further investigation. *Id.* And, finally, a 2008 Executive Order, EO 13462, largely stripped the IOB of its independent oversight authority: EO 13462 eliminated the requirement that intelligence agencies forward reports of violations to the IOB on a quarterly basis and eliminated the IOB's authority to forward reports to the Attorney General for further investigation. Exec. Order 13462 (Feb. 29, 2008).

10. In October 2009, President Obama amended EO 13462 to restore the IOB's oversight capacity to its previous status. *See* Exec. Order Amending Exec. Order 13462 (Oct. 28, 2009).⁴ President Obama's amendments reinstated the IOB's authority to require intelligence agencies to report violations to the IOB. *Id.* at Section (e). The Amended Executive Order also

¹ Available at http://www.boston.com/news/nation/washington/articles/2008/03/14/president_weakens_espionage_oversight/.

² Available at <http://www.whitehouse.gov/administration/eop/piab/about>.

³ Available at <http://www.whitehouse.gov/the-press-office/president-obama-signs-executive-order-amend-executive-order-13462>.

⁴ Available at <http://www.whitehouse.gov/the-press-office/president-obama-signs-executive-order-amend-executive-order-13462>.

1 reinstated the IOB's ability to forward reports of illegal conduct to the Attorney General. *Id.* at
 2 Section (c). Shortly after signing the amending Executive Order, President Obama appointed two
 3 co-chairs to the PIAB. To date, President Obama has announced 11 appointments to the PIAB.
 4 White House Press Release, *President Obama Announces Members of the President's Intelligence*
 5 *Advisory Board*.⁵ However, nearly three years into President Obama's term, no appointments to the
 6 IOB have been announced. *See* Ken Dilanian, *FBI Involved in Hundreds of Violations in National*
 7 *Security Investigations*, L.A. TIMES, January 30, 2011.⁶

8 11. Due to the IOB's central role in intelligence oversight, Plaintiff has submitted
 9 previous FOIA requests to DNI and other Executive agencies for records concerning the IOB. *See*
 10 *Electronic Frontier Foundation v. CIA*, CV-09-3351 (N.D. Cal. 2009) (FOIA litigation stemming
 11 from requests for IOB reports submitted by DNI, CIA, FBI, NSA, DHS, DOJ, Department of State,
 12 Department of Defense, and Department of Energy). Those requests, and the subsequent litigation
 13 stemming from those requests, have resulted in the disclosure of tens of thousands of records
 14 documenting previously secret reports of intelligence agency misconduct. *See* EFF, *FOIA:*
 15 *Intelligence Agencies' Misconduct Reports*.⁷ As is its practice in FOIA matters, Plaintiff has made
 16 all documents obtained through its IOB FOIA litigation publicly available on its website. *See id.*

17 **Plaintiff's FOIA Request and Request for Expedited Processing**

18 12. The Director of National Intelligence ("DNI") serves as the head of the intelligence
 19 community for the United States government and is the "principal advisor to the President, the
 20 National Security Council, and the Homeland Security Counsel for intelligence matters related to
 21 national security." *An Overview of the United States Intelligence Community for the 111th*
 22 *Congress* (2009) at 1.⁸ As the head of the intelligence community, DNI's responsibilities include
 23 "ensur[ing the intelligence community's] compliance with statutory and Presidentially-mandated
 24 responsibilities," including Executive Orders. *Id.* Accordingly, DNI is the Executive agency most
 25 likely to be in possession of the records concerning the IOB sought by Plaintiff.

26 ⁵ Available at [http://www.whitehouse.gov/the-press-office/president-obama-announces-members-](http://www.whitehouse.gov/the-press-office/president-obama-announces-members-presidents-intelligence-advisory-board)
 27 [presidents-intelligence-advisory-board](http://www.whitehouse.gov/the-press-office/president-obama-announces-members-presidents-intelligence-advisory-board); *see also*

⁶ Available at <http://articles.latimes.com/2011/jan/30/nation/la-na-fbi-violations-20110130>.

⁷ Available at <https://www.eff.org/foia/intelligence-agencies-misconduct>.

⁸ Available at <http://www.dni.gov/overview.pdf>.

13. In a letter dated February 15, 2011 and sent by facsimile to the DNI, Plaintiff requested under the FOIA all agency records, including electronic records, from November 1, 2008 to the present concerning or reflecting:

1. The composition, membership, vacancies on, and/or appointments to be made to the Intelligence Oversight Board ("IOB")
2. Any discussions or communications between officials or employees of ODNI and any White House officials or employees regarding the composition, membership, vacancies on, and/or appointments to be made to the IOB
3. Any discussions or communications between officials or employees of ODNI and officials or employees of other intelligence agencies regarding the composition, membership, vacancies on, and/or appointments to be made to the IOB
4. Any discussions or communications between officials or employees of ODNI and any member of Congress or congressional staffer regarding the composition, membership, vacancies on, and/or appointments to be made to the IOB
5. Any discussions or communications regarding the reasons, explanations, or rationales provided for President Obama's appointment of, or the failure to appoint, members to the IOB

14. In its February 15th letter, Plaintiff also formally requested that the processing of its FOIA request be expedited because it pertains to information about which there is "[a]n urgency to inform the public about an actual or alleged federal government activity," and the request was "made by a person primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 1700.12(c)(2).

15. Defendant acknowledged Plaintiff's request via letter dated February 17, 2011. The letter noted Defendant's acceptance of Plaintiff's request. Defendant's February 17th letter also summarily denied Plaintiff's request for expedited processing.

16. By letter dated February 28, 2011 and sent by facsimile, Plaintiff appealed Defendant's denial of expedited processing of Plaintiff's request.

17. On information and belief, Defendant received Plaintiff's administrative appeal on February 28, 2011.

18. To date, Defendant has never formally acknowledged receipt of Plaintiff's appeal, nor has Defendant informed Plaintiff of the outcome of the appeal.

19. To date, Defendant has not produced any records in response to Plaintiff's request described in paragraph 13, nor informed Plaintiff of an anticipated date for the completion of the processing of the request.

20. Not only has Defendant failed to expedite the processing of Plaintiff's request, but it has also exceeded the generally applicable twenty-day deadline for the processing of *any* FOIA request.

21. Plaintiff has exhausted the applicable administrative remedies with respect to the FOIA request referenced herein.

22. Defendant has wrongfully withheld the requested records from Plaintiff.

CAUSES OF ACTION

Violation of the Freedom of Information Act for Failure to Expedite Processing

23. Plaintiff repeats and realleges paragraphs 1-22.

24. Defendant has violated the FOIA by failing to expedite the processing of Plaintiff's FOIA request.

25. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant's failure to expedite the processing of Plaintiff's request.

26. Plaintiff is entitled to injunctive relief with respect to the expedited processing of the requested agency records.

Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records

27. Plaintiff repeats and realleges paragraphs 1-22.

28. Defendant has wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for the processing of a FOIA request.

29. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant's wrongful withholding of the requested records.

30. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

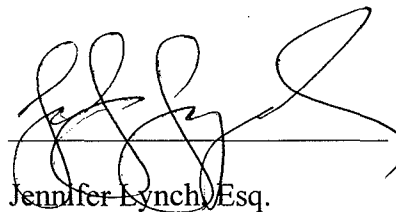
REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. order Defendant to process immediately the requested records in their entirety;
2. order Defendant, upon completion of such expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiff;
3. provide for expeditious proceedings in this action;
4. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
5. grant such other relief as the Court may deem just and proper.

DATED: September 27, 2011

By



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